No. 435

IN THE

SUPREME COURT OF THE UNITED STATES

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Appellant and Cross-Appellee,
versus
MINNIE L. B. HAMILTON,
Appellee and Cross-Appelee.
and
(Reverse Title)
and
OAKLAND CORPORATION,
Appellant,
versus
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Appellee.

Petition for Writ of Certiorari and Brief in Support of Petition

LOUIS W. DAWSON,
34 Nassau Street,
New York, New York.
McKAY, DIXON & DeJARNETTE,
By H. REID DeJARNETTE,
First National Bldg.,
Miami, Florida.

INDEX

CITATIONS

CITATIONS—Continued

IN THE

SUPREME COURT OF THE UNITED STATES

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Appellant and Cross-Appellee,
versus
MINNIE L. B. HAMILTON,
Appellee and Cross-Appelee.
and
(Reverse Title)
and
OAKLAND CORPORATION,
Appellant,
versus
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Appellee.

Petition for Writ of Certiorari and Brief in Support of Petition

This petition for certiorari is based upon the fact that the Circuit Court of Appeals for the Fifth Circuit has decided an important question of Florida law in a way probably in conflict with applicable Florida decisions.

The question of Florida law is whether proof of suicide by circumstantial evidence must be made to the exclusion of any other reasonable hypothesis or may be made merely by a preponderance of inferences.

The Circuit Court of Appeals held that sucide may be proven by circumstantial evidence merely by a preponderance of inferences. The applicable Florida decisions hold that circumstantial evidence of suicide must be so strong as to exclude any other reasonable hypothesis.

The facts giving rise to this question are as follows:

Minnie L. B. Hamilton sued the Mutual Life Insurance Company of New York for the death benefits provided in two policies of life insurance. Proof relied upon by the plaintiff to show death and time of death of Hamilton, the insured and husband of plaintiff, was entirely circumstantial. Hamilton disappeared on December 28, 1928. At that time he was residing in a rooming house in Jacksonville, Florida, and was engaged in an unsuccessful business venture with his daughter and son-in-law. He had become estranged from his wife, who lived in Miami, and he had not seen her for about a year. He had purposely avoided her when returning from Cuba through Miami in the summer of 1928. He was not contributing to the support of his wife or children. It was known to his wife and family that he was following a Mrs. Louckes around the country. This was not a novel situation as Hamilton had been convicted in Georgia for living with a negro woman and had served a penitentiary term. He had told his daughter that the income from the business was insufficient to support the three of them (Hamilton, his daughter, and her husband), and that he was going away to seek employment elsewhere. On the night of December 28, 1928, he gave the office key to his daughter. The next morning he was gone, having taken with him his baggage, his clothes, and all his personal effects. His

daughter was not concerned over his departure and did not institute a search for him until some time thereafter, she being of the opinion that in accordance with his avowed intention he was seeking employment elsewhere. When search was commenced, no trace of Hamilton could be found. His body was not found. None of his baggage nor his personal effects was found.

The seven-year presumption statute was relied upon to prove the fact of death. However, it was necessary to prove that Hamilton died prior to the expiration of the seven-year period, inasmuch as the extended value of the insurance policies expired prior to seven years. Therefore, the **time** of death became of paramount importance. The plaintiff advanced the only theory which was open to her: viz., that Hamilton committed suicide at the time of his disappearance. The jury, by special verdict, found that he died on December 29, 1928.

The Supreme Court of Florida in an unbroken line of decisions has held that where circumstantial evidence is relied upon to prove suicide it must be so strong as to exclude every other reasonable hypothesis:

> **Sovereign Camp of W. O. W. v. Hodges, 72 Fla. 467, 73 So. 347;**
>
> **Mutual Life Ins. Co. of N. Y. v. Johnson, 122 Fla. 567, 166 So. 442;**
>
> **Mutual Life Ins. Co. of N. Y. v. Bell, 147 Fla. 734, 3 So. (2) 487;**
>
> **New York Life Ins. Co. v. Satcher, ——— Fla. ———, 12 So. (2) 108 (1943).**

All of these cases involve proof of suicide by circumstantial evidence. None of these cases was cited as authority by the Circuit Court of Appeals. Instead, another series of cases (see Appendix I) dealing with proof by circumstantial evidence of disputed facts **other than suicide** and permitting proof of such other facts by circumstantial evidence merely to the extent of a preponderance of inferences, was cited.

There is no Florida case which holds, or intimates, that suicide as a disputed fact may be proved by a preponderance of inferences from circumstantial evidence. All Florida cases hold that where suicide is an issue, circumstantial evidence must be so strong as to exclude every other reasonable hypothesis.

The opinion of the Circuit Court of Appeals shows on its face that the foregoing facts do not exclude every other reasonable hypothesis because the court proposes a series of questions left in doubt by the evidence, each of which contains an hypothesis inconsistent with suicide (see Appendix II).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Circuit Court of Appeals said:

> "The plaintiffs have relied wholly upon inferences which they draw from circumstantial evidence to prove death by suicide on the 29th day of December, 1928. There is no direct testimony of death at any time or in any manner."
> (Tr. 404-5)

In the Circuit Court of Appeals we relied largely upon the decision of the Fifth Circuit in the case of **Mutual Life Ins. Co. of N. Y. v. Zimmerman, et al, 75 Fed. (2) 758.** The opinion in that case was written by Judge Sibley, who did not participate in the case at bar. In the Zimmerman case the court said:

> "Not quite seven years of disappearance had gone by at the time of the trial, so that no presumption of law had arisen concerning death, but **if it had the presumption would not be of death at any particular date within the seven years. If death must be established at a definite date before the expiration of the seven years, something besides the presumption is necessary.** Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086; United States v. Hayman (C. C. A.) 62 F. (2d) 118. **The question here is whether Zimmerman was drowned on August 24, 1927, for there is nothing to show that he died by any other means or on any other date.** The jury, though finding he was dead, declined to find that the death was accidental. The verdict seems to imply suicide; but in our opinion the evidence does not show that he was dead at all at the expiration of the insurance. None of the uncontradicted and unimpeached testimony which is reasonably credible can be arbitrarily rejected, but all must be construed together. * * * * * We must therefore conclude that while Zimmerman was indulgent and affectionate to his wife and daughter, he also indulged a taste for other women, and was on intimate terms at least with Annie, who had an automobile, and, like himself,

disappeared. He had left wife and daughter once before, though he had in late years been active and diligent in business and had held steady employments. It is also true that in 1927 he was headed for financial disaster, and it was imminent, and some of his transactions, especially his borrowing $3,000 on a note signed in the name of Fugazzi Bros., who did not receive the money, seemed likely to embarrass him greatly. He does not therefore stand as one of blameless domestic, civic, and business character who would have every reason to disclose his whereabouts and return to his associates if living, and whose disappearance therefore could only with the greatest difficulty be explained as voluntary.

* * * * *

"There is a possibility that he is dead, but the circumstances are not such as to make that the only probable explanation of them. Circumstantial evidence, even in a civil case, must not only consist with the theory that authorizes recovery, but must fairly and reasonably exclude any other explanation of the facts. Unless it does this, the burden which rests upon the plaintiff to prove her case is not carried. Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819; Florida East Coast R. Co. v. Acheson, 102 Fla. 15, 135 So. 551, 552, 137 So. 695, 140 So. 467; Foster v. Thornton, 113 Fla. 600, 152 So. 667. There is no proof here of an unusual peril to the insured which would probably have killed him, as referred to in Davie v. Briggs, 97 U. S. 628, 24 L. Ed.

1086, and Brownlee v. Mutual Benefit Health & Acc. Ass'n (C. C. A.) 29 F. (2d) 71."

We should mention here the fact that in the case at bar there is no proof of an unusual peril to bring this case within the rule laid down in Davie v. Briggs, supra.

The Circuit Court of Appeals decided the case at bar upon the erroneous assumption that the law regarding circumstantial evidence as it relates to proof of suicide was changed subsequent to the Zimmerman case. It said:

> "Since the opinion by Judge Sibley in the case of Mutual Life Insurance Company of New York vs. Zimmerman, supra, the Florida rule that circumstantial evidence relied upon in a civil case must not only be consistent with the theory that authorizes recovery but must fairly and reasonably exclude any other explanation of the facts, has been modified by King vs. Weis-Patterson Lumber Company, 124 Fla. 272, 168 So. 858; Stigletts vs. McDonald, 135 Fla. 385, 186 So. 233; and Fireman's Fund Indemnity Co. vs. Perry, 149 Fla. 410, 5 So. 2d 862.
>
> * * * * *
>
> "It, therefore, is not the rule in Florida now that circumstantial evidence in a civil case must exclude every other reasonable hypothesis than the one proposed to be proven. It is sufficient now if the circumstantial evidence amounts to a preponderance of all reasonable inferences that can be drawn from the circumstances in evidence to

> the end that the evidence is not reasonably susceptible of two equally reasonable inferences."
> (Tr. 394-5)

So, it is contended, and we shall presently demonstrate, that the Circuit Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions.

The Florida rule regarding circumstantial evidence was exactly the same before the Zimmerman case as it was afterward. The Zimmerman case was decided in 1935. The Supreme Court of Florida in 1933, in the case of **City of Pensacola v. Herron, 112 Fla. 742, 150 So. 877,** announced exactly the same rule regarding circumstantial evidence and in almost identical language as is set forth in the King case, which was decided in 1936, and which is stated by the Court to have changed the rule regarding circumstantial evidence. There was, therefore, **no change** in the Florida law after the Zimmerman case was decided. As hereinafter pointed out, Judge Sibley, in the Zimmerman case, correctly applied the Florida rule regarding the proof of suicide by circumstantial evidence.

The early rule of the Florida Supreme Court was that in all cases proof by circumstantial evidence must be so strong as to exclude every reasonable hypothesis to the contrary. Thus it is said in **Florida East Coast Ry. Co. v. Acheson, 102 Fla. 15, 135 So. 551:**

> "The value of circumstantial evidence consists in the conclusive nature and tendency of the circumstances relied upon to establish any contro-

verted fact. Such evidence is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof. Whetson v. State, 31 Fla. 240, 12 So. 661."

Later, the rule was relaxed in some types of cases and to this class belongs those cases relied on by the Circuit Court of Appeals in its opinion.

King v. Weis-Patterson Lumber Company, 124 Fla. 272, 168 So. 858.

Stigletts v. McDonald, 135 Fla. 385, 186 So. 233.

Fireman's Fund Indemnity Co. v. Perry, 149 Fla. 410, 5 So. 2d 862.

Reed v. American Insurance Co. of Newark, 128 Fla. 549, 175 So. 224.

None of these cases, however, involved the issue of suicide. The King case involved merely an inference of negligence in permitting an accumulation of a quantity of inflammable trash. The Stigletts case related to proof of a gift by circumstantial evidence. The Perry case involved the disappearance of insured jewelry. The Reed case involved a fire insurance loss.

Where the issue is suicide and circumstantial evidence is relied upon, the presumption against suicide comes into play in the judicial process and proof is required to a

much stronger degree. The first case involving suicide is **Sovereign Camp of W. O. W. v. Hodges, 72 Fla. 467, 73 So. 347,** where the court said:

> "The value of circumstantial evidence consists in the conclusive nature and tendency of the circumstances relied upon to establish any controverted fact. This language of Mr. Justice Mabry in the case of Whetson v. State, 31 Fla. 240, 12 South. 661, received the unanimous approval of this court as then constituted, and the case has several times been cited with approval by this court. Gantling v. State, 40 Fla. 237, 23 South. 857; Jenkins v. State, 35 Fla. 737, 18 South. 182, 48 Am. St. Rep. 267. In the Whetson Case the court quoted from Mr. Starkle in his work on Evidence as follows:
>
> > 'Such evidence is always insufficient where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof. Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be.'
>
> Mr. Justice Taylor, speaking for the court in Kennedy v. State, 31 Fla. 428, 12 South. 858, said:

> 'First, that the circumstances from which the conclusion is drawn should be fully established; second, that all the facts should be consistent with the hypothesis; third, that the circumstances should be of a conclusive nature and tendency; and fourth, that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved.' "

The next suicide case decided by the Florida Supreme Court is **Mutual Life Ins. Co. of New York v. Johnson, 122 Fla. 567, 166 South. 442,** wherein the Supreme Court says of the presumption against suicide:

> "It prevails when the cause of death is unknown,"

and

> "The rule most generally approved is that when circumstantial evidence is relied on to establish self-destruction, the one relying on it carries the burden of proving it **to the exclusion of every reasonable hypothesis of accidental death. . . .** The presumption against suicide cannot stand against uncontroverted evidence direct or circumstantial, which points **conclusively** to self-destruction, but **when the cause of death is unexplained,** or, if the evidence tends to establish death by accidental means, or **some of the evidence is consistent with a reasonable hypothesis that death was not self-imposed, the presumption against self-destruction may prevail."**
>
> (Emphasis supplied.)

The Circuit Court of Appeals, having found "there is no direct testimony of death at any time or in any manner", certainly has brought the case at bar within the pronouncement of the Johnson case, supra, because, conceding for the sake of the argument that Hamilton was dead, the "cause of death is unknown."

To the same effect are **Gulf Life Ins. Co. 126 Fla. 568, 172 South. 235,** and **Mutual Life Ins. Co. of N. Y. v. Bell, 147 Fla. 734, 3 South. (2) 487.**

The last case involving proof of suicide by circumstantial evidence is **New York Life Ins. Co. v. Satcher, ——Fla.——, 12 South. (2d) 108 (1943),** wherein the court said:

> "The rule is generally approved that when the defendant comes forward with a plea of suicide he must prove it beyond a reasonable doubt just as he would the defense in a criminal case. The evidence must exclude every other reasonable hypothesis of death. If the evidence is such as to leave the minds of the jury in a state of equipoise and they are unable to say whether death was by accident or by suicide, they should not find a verdict for more than the face of the policy because accidental death was not proved, but when there is evidence both ways, the presumption against suicide supports accidental death and to be overcome, the evidence must leave room for no other reasonable hypothesis than that of suicide."

The court has correctly held in its opinion that the

verdict of the jury in this case can be supported only upon the theory that Hamilton committed suicide on December 29, 1928:

> "The plaintiffs have relied wholly upon inferences which they draw from circumstantial evidence to prove death by suicide on the 29th day of December, 1928. There is no direct testimony of death at any time or in any manner."
>
> (Opinion page 13)

The numerous questions which the court framed in its opinion as being suggested by the evidence demonstrates that numerous hypotheses inconsistent with suicide have not been excluded under the law laid down and consistently followed by the Florida Supreme court, both before and after the Zimmerman case.

We submit that the Circuit Court of Appeals has overlooked the application of this rule of Florida law and that the application of this rule requires a reversal of this case.

.....

.....

Attys. for Petitioner.
908 First Natl. Bldg.,
Miami, Fla.

APPENDIX I

King vs. Weis-Patterson Lumber Company, 124 Fla. 272, 168 So. 858;

Stigletts vs. McDonald, 135 Fla. 385, 186 So. 233;

Fireman's Fund Indemnity Co. vs. Perry, 149 Fla. 410, 5 So. 2d 862.

APPENDIX II

EXCERPTS FROM THE OPINION OF THE CIRCUIT COURT OF APPEALS SHOWING QUESTIONS RAISED BY THE EVIDENCE AND PROPOSED BY THE COURT:

(1) Was Hamilton the affectionate, home-loving husband and father as pictured by some of the family, who would yearn continuously to return to the bosom of that family and who would constantly seek news of their welfare, or was he a lean, lewd, and lascivious Casanova, familiar with the solace of lustful women, who preferred their companionship to that of his admittedly unaffectionate spouse?

(2) Was he the loving husband and father, who would be presumed to keep in touch with his home and family, in view of the showing that on his return from Cuba through Miami he kept his presence hidden from, and failed to visit, his family, other than one of his sons, from whence he secretively moved on to places unknown?

(3) Was his visitation in Gloversville, New York, with Mr. and Mrs. Louckes one motivated wholly by an effort to gain health and employment?

(4) It is not the normal act of a father who is interested in his home and family to seek surcease from his sickness, disappointments, and sorrows in the bosom of that family rather than among outsiders, such as Mr. and Mrs. Louckes, and in places hundreds of miles away?

(5) Is it the act of a father and husband interested in home and family to absent himself from that family from the early part of the year 1928 until its end, during much of which time he was without gainful occupation or employment?

(6) If the motive of the insured was to commit suicide so as to improve the financial situation of the family which he had not seen nor sought to see in so long, why did he not make the proof of his sacrifice available so that the body could be found and proof of his death made? If he were making the supreme sacrifice for the sustenance and support of his family, why did he not leave a note to that family in order that the result of his acts might have the desired fruition?

(7) If he planned to fare forth into eternity, why did he take his grip and clothes, which habiliments he must have known he could not take beyond the grave?

(8) If he committed suicide or otherwise died on December 29, why was not some trace found of either his body or his personal belongings?

(9) If he could stand in the face of his family, unabashed and unashamed, after having served a sentence in the penitentiary for a highly immoral offense, does it stand to reason that he was afraid to stand in the presence of his family merely because his health and his business were failing?

(10) Can much credence be given to the evidence as to the spiritual and religious life of an absentee deacon of

the church **when** it is so strongly asserted that he was guilty of the unpardonable sin of self-destruction?

(11) And, what evidence is there in the record to justify the conclusion of suicide? His statement to his daughter that he was leaving, and his statement shortly before that time that he was going to hunt a job, and the statement that what he was going to do he hoped would be the best for all concerned and his request to the bank to pay the premium on his insurance for another year, at the end of which he would either be better or dead, his ill health, despondency, and impecuniosity, his return of the Christmas gifts with the statement that he would not need them, are all the circumstances upon which a theory of suicide could be based.

(12) Was his failure or refusal to tell his daughter what his plans were evidence of a suicidal intent any more than it was evidence of an absence of any definite plan, or of a secret purpose to absent himself from his financial and family responsibilities?

(13) Was the shedding of a few tears and the statement "I just hope what I am going to do is for the good of all the family," inconsistent with the statement previously made to the witness that he was planning to leave the business to find employment elsewhere?

(14) Was the shedding of tears any more consistent with an intent to commit suicide than with a realization that he had not been of much help or honor to his family and that if he moved on into obscurity it might be best for all concerned?

(15) Was his statement in the letter of December 18, 1928, requesting the bank to pay the premiums on his insurance, to the effect that he had been in bad health and unable to work but that he guessed he would either be all right or dead by the time another premium came due, consistent with the conduct of one who was contemplating suicide or of one who was planning to live?

(16) If the insured had intended to destroy himself shortly before his insurance policies lapsed, would he have been concerned with the unnecessary payment of premiums?

(17) Where a father had sent no Christmas gifts to his family, does the fact that he returns gifts to his daughter with the request that she give them to his sons, meanwhile asserting that he would not need the gifts, sustain the conclusion that he intended to take his own life any more than it justifies the conclusion that he was neither giving to, nor receiving from, his family anything further, and by this method was making a symbolic severance of relations preparatory to an intended desertion of that family?

No. 435

IN THE SUPREME COURT OF THE UNITED STATES

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner,

versus

MINNIE L. B. HAMILTON and OAKLAND CORPORATION,
Respondents.

Petition for Writ of Certiorari

BRIEF OF RESPONDENTS

KNIGHT & GREEN
By DEWEY KNIGHT
Attorneys for Respondents
1117 Ingraham Building
Miami 32, Florida.

INDEX OF CONTENTS

INDEX OF CITATIONS

Decisions cited:

INDEX OF CITATIONS—Continued

INDEX OF CITATIONS—Continued

Annotations Cited:

Texts Cited:

IN THE
SUPREME COURT OF THE UNITED STATES

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner,

versus

MINNIE L. B. HAMILTON and OAKLAND CORPORATION,
Respondents.

Petition for Writ of Certiorari

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The petition for certiorari is based solely upon the contention that the Circuit Court has decided an important question of Florida law in a way probably in conflict with applicable Florida decisions. It is not considered necessary or of aid to the Court to make any extended statement of the facts in the case at bar. A short statement would not do justice to respondent's case. The statement of the facts, as presented in the petition and brief accompanying the same, is partisan, incomplete and not sufficiently detailed to properly en-

lighten the Court. In this connection we shall content ourselves to refer to and adopt the fair statement of the case as presented in the opinion of the Circuit Court (R. 381-386).

Respondent takes two positions, viz:

(a) That there is no conflict between the decision of the Circuit Court and local decisions;

(b) That the Circuit Court applied the correct law as to evidence sufficient to fix the time of death where aided by the presumption of death and the fact of death.

ARGUMENT

At the outset it is respectfully suggested that the brief of petitioner does not comply with Rule 27 of this Honorable Court in the following respects:

(a) A sub-index of the matter in the brief with page references is not set forth;

(b) There is not set forth a concise statement of the case containing all that is material to the consideration of the question presented, **with appropriate page references to the printed record;**

(c) There is no assignment of errors or questions stated.

I.

NO CONFLICT BETWEEN DECISION OF CIRCUIT COURT AND LOCAL DECISIONS.

The petition is based upon one sole contention: That the Circuit Court has decided an important question of local law in a way probably in conflict with applicable local decisions. We take the position that there is no conflict.

That portion of the decision of the Lower Court (R. 391) 143 Fed. (2d) 726, which is referred to in petitioner's brief as presenting a conflict, is quoted as follows:

> "The plaintiffs have relied wholly upon inferences which they draw from circumstantial evidence to prove death by suicide on the 29th day of December, 1928. There is no direct testimony of death at any time or in any manner. (fol. 394) Since the opinion by Judge Sibley in the case of MUTUAL LIFE INSURANCE COMPANY OF NEW YORK vs. ZIMMERMAN, supra, the Florida rule that circumstantial evidence relied upon in a civil case must not only be consistent with the theory that authorizes recovery but must fairly and reasonably exclude any other explanation of the facts, has been modified by KING vs. WEIS-PATTERSON LUMBER COMPANY, 124 Fla. 272, 168 So. 858; STIGLETTS vs. McDONALD, 135 Fla. 385, 186 So. 233; and FIREMAN'S FUND INDEMNITY CO. vs. PERRY, 149 Fla. 410, 5 So. 2d 862. In the last cited case the Supreme Court of Florida said:

'In the case of Reed et vir. v. American Insurance Co. of Newark, New Jersey, 128 Fla. 549, 175 So. 224, 225, we stated the rule to be applied in testing the sufficiency of circumstantial evidence in civil cases, as follows:

" 'In civil cases the preponderance of evidence required, where circumstantial evidence is relied on as the method of proof, is a preponderance of all reasonable inferences that might be drawn from the circumstances in evidence to prove the principal fact sought to be established sufficient to outweigh all other contrary inferences. King v. Weis-Patterson Lumber Co., 124 Fla. 272, 168 So. 858.'

'In Stigletts v. McDonald, 135 Fla. 385, 186 So. 233, 235, we said:

" 'Circumstantial evidence must as a general rule be of such a conclusive nature that it is not reasonably susceptible of two equally reasonable inferences.' "

"It, therefore, is not the rule in Florida now that circumstantial evidence in a civil case must exclude every other (fol. 395) reasonable hypothesis than the one proposed to be proven. It is sufficient now if the circumstantial evidence amounts to a preponderance of all reasonable inferences that can be drawn from the circumstances in evidence to the

> end that the evidence is not reasonably susceptible of two equally reasonable inferences."

It will be noted that the Circuit Court merely states:

> "It, therefore, is not the rule in Florida now that circumstantial evidence **in a civil case** must exclude every other reasonable hypothesis than the one proposed to be proven." (Emphasis supplied)

Not only do the cases cited by the Court bear out this statement, as contained in the above quotation, but we shall endeavor to show that other cases likewise so decided and that the Court was eminently correct in this statement of the law of Florida, as enunciated by its Supreme Court.

If there is no probable conflict, then the petition here must fail. No other error is complained of. This Court is, therefore, only interested in determining: Where is the conflict?

The rule referred to by the Circuit Court applies in civil cases as to circumstantial evidence. If there is any exception to the rule as to circumstantial evidence in suicide cases, the Circuit Court made no reference to such rule or exception. We shall now review all the decisions in Florida which announce the general rule in civil cases from 1906 to date.

In **Abraham v. Baldwin,** 52 Fla. 151, 42 So. 591, the Court held:

> "The other objection is to the words, 'and in order for the defendant to justify or relieve herself therefrom it becomes necessary for such defendant to establish the truth of the words so uttered to the satisfaction of your minds by competent evidence to the exclusion of and beyond a reasonable doubt.'
>
> This charge was doubtless given on the authority of Schultz v. Pacific Insurance Co., 14 Fla. 73, text 121, and Williams v. Dickenson, 28 Fla. 90, text 113, 9 So. 847, where it was held that a fact must be established by the same evidence, whether it is to be followed by a civil or a criminal consequence, and that the character of the fact to be proven, and not the position of the party, determines the degree of proof to be required.
>
> This rule is said to have been established in England because the plaintiff may there be tried for the crime imputed to him upon a verdict of justification without the intervention of a grand jury. No such result follows here. Therefore the reason for the rule does not exist. See Cook v. Field, 3 Esp. 133; Wilmett v. Harmer, 8 Car. & P. 695 (34 E.C.L. 589); Ellis v. Buzzell, 60 Me. 209, 11 Am. Rep. 209.
>
> The decisions heretofore made by this court upon the point have not become the basis of property

rights, nor do they constitute a distinct policy in the administration of justice, and, as no harm can result in establishing a rule in accord with reason and the great weight of authority, the rule as first announced in Schultz v. Pacific Insurance Co., supra, and reluctantly followed in Williams v. Dickenson, supra, is now disproved.

In **Sovereign Camp of Woodmen v. Hodges,** (1916) 72 Fla. 467, 73 So. 347, the general rule as to circumstantial evidence in civil cases is stated:

"But the charge was held to be erroneous upon the authority of the Schultz Case. The rule announced in the Schultz Case, however, was definitely overruled in the case of Abraham v. Baldwin, 52 Fla. 151, 42 South. 591, 10 L.R.A. (N.S.) 1051, 10 Ann. Cas. 1148. So that, although love of life may be strong in mankind and self-destruction be regarded as in the nature of a criminal act, and the burden of proof rests upon the party asserting suicide, it may be regarded as settled by this court that such defense in a case of this character need not be established to the satisfaction of the jury beyond a reasonable doubt, in order that it may prevail, but that to maintain it the evidence should preponderate in favor of that contention. In this case, however, the evidence relied upon by the defendant to establish the defense was circumstantial, and while no presumption of law existed against the suicide of Mr. Hodges, the burden of proving his self-destruction rested upon the defendant, to be decided by

the jury as an inference of fact in the same manner as other facts are determined in civil cases." (p. 351)

In **Florida East Coast Ry. Co. v. Acheson,** (1931) 102 Fla. 15, 135 So. 551, the Court changed its rule as to the sufficiency of circumstantial evidence to sustain a verdict in a civil case. We cite therefrom the following statement:

> "(2) Circumstantial evidence is, of course, sufficient to sustain a verdict for damages in a civil case at law, and, where is is complete in its probative value, and excludes an hypothesis inconsistent with the theory that defendant committed the wrongful and negligent acts complained of, the verdict of a jury will not be disturbed as being contrary to the evidence. Sovereign Camp, W.O.W., v. Hodges, 72 Fla. 467, 73 So. 347.
>
> (3, 4) The value of circumstantial evidence consists in the conclusive nature and tendency of the circumstances relied upon to establish any controverted fact. Such evidence is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof. Whetston v. State, 31 Fla. 240, 12 So. 661." (p. 552)

It is evident that the Supreme Court of Florida overlooked the conflict in its decisions on this point, as in

the case of **City of Pensacola v. Herron,** 112 Fla. 742, 150 So. 877, the Court reverted back to the rule as laid down in **Abraham v. Baldwin,** supra, and followed by **Sovereign Camp v. Hodges, supra.** The Herron case holds:

> "When circumstantial evidence is the means of proof employed to prove an essential fact of this kind, the rule in civil cases is that the particular inference of the existence of the fact relied on as arising from the circumstances established by the evidence adduced, shall outweigh all contrary inferences to such an extent as to amount to a preponderance of all reasonable inferences that might be drawn from the same circumstances, whereas the rule in criminal cases is that the inference drawn shall be not only consistent with the existence of the fact sought to be proved, but wholly inconsistent with any other reasonable inference to the contrary."

In this decision the Court draws clearly the distinction between the rule obtaining in criminal cases and the rule to be followed in civil cases.

However, in 1934, the same Court rendered its decision in **Foster v. Thornton,** 113 Fla. 701, 152 So. 667, and, without mentioning the decision in **Pensacola v. Herron,** supra, (1933) again stated the rule in line with **Florida East Coast Ry. v. Atcheson,** supra, as follows:

> "(2) Where the circumstances raise a fair presumption of negligence involves a consideration of the very principle underlying the probative

force and admissibility of such evidence, and that is the logical connection between the circumstances and the result as to which the inquiry is directed. For the circumstances, therefore, to have any probative value as evidence of the principal question, they must of necessity be not only consistent with the theory that the result inquired into flowed therefrom, but inconsistent with any other result which might just as reasonably and logically be established by such circumstances." (p. 670)

In 1936, in **King v. Weis-Patterson Lumber Co.**, 124 Fla. 272, 168 So. 858, the Court again returned to the general rule as previously stated:

"Where the circumstantial evidence is relied on in a civil case to prove an essential fact or circumstance essential to recovery, the rule is that the particular inference of the existence of the fact relied on as arising from the circumstances established by the evidence adduced, **shall outweigh all contrary inferences** to such extent as to amount to a preponderance of all of the reasonable inferences that might be drawn from the same circumstances. This is a less rigid rule than applies in a criminal case, where the inference drawn must not only be consistent with the fact sought to be proved, but wholly inconsistent with any other reasonable inference to the contrary. City of Pensacola v. Herron, 112 Fla. 742, 150 So. 877; Sovereign Camp, W.O.W. v. Hodges, 72 Fla. 467, 73 So. 347." (p. 859). (Emphasis supplied)

In **Reed v. American Ins. Co.**, 128 Fla. 549, 175 So. 224 (1937), the Court followed the rule as announced in **King v. Weis-Patterson,** supra, as follows:

> "(3) One of the issues, perhaps the principal one, tried by the jury, was on the defendant's plea that the insured willfully set fire to the insured property. There was circumstantial evidence legally sufficient to support a finding in the affirmative of defendant's plea setting up this issue. In civil cases the preponderance of evidence required, where circumstantial evidence is relied on as the method of proof, is a preponderance of all reasonable inferences that might be drawn from the circumstances in evidence to prove the principal fact sought to be established sufficient to outweigh all other contrary inferences. King v. Weis-Patterson Lumber Co., 124 Fla. 272, 168 So. 858." (p. 225)

Again, in the case of **Stigletts v. McDonald,** 135 Fla. 385, 186 So. 233, (1938), the Court followed the rule as laid down in **King v. Weis-Patterson,** supra:

> "Circumstantial evidence must as a general rule be of such a conclusive nature that it is not reasonably susceptible of two equally reasonable inferences.
>
> 'The value of circumstantial evidence consists in the conclusive nature and tendency of the circumstances relied upon to establish any controverted fact. Such evidence is always insufficient, where,

assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof. Whetson v. State, 31 Fla. 240, 12 So. 661.' Florida East Coast Ry. Co. v. Acheson, 102 Fla. 15, 135 So. 551, 552, 137 So. 695, 140 So. 467; 82 A.L.R. 213, note.

A later case modifies the rule in civil cases as follows:

'Where circumstantial evidence is relied on in a civil case to prove an essential fact or circumstance essential to recovery, the rule is that the particular inference of the existence of the fact relied on as arising from the circumstances established by the evidence adduced, shall outweigh all contrary inferences to such extent as to amount to a preponderance of all of the reasonable inferences that might be drawn from the same circumstances. This is a less rigid rule than applies in a criminal case, where the inference drawn must not only be consistent with the fact sought to be proved, but wholly inconsistent with any other reasonable inference to the contrary.' (King v. Weis-Patterson Lumber Company, 124 Fla. 272, 168 So. 858." (pp. 235-236)

It will be noted in the **Stigletts** case that the Court draws the distinction between its ruling in the **King** and **Atcheson** cases and clearly recognized that the **King** case modified the rule in civil cases, as the Court had previously stated it.

In the case of **Fireman's Fund Indemnity Co. v. Perry,** 149 Fla. 410, 5 So. (2d) 862, (1942) the Court reaffirmed its rule as laid down in the **Reed** case and the **King** case:

> "In the case of Reed et vir v. American Insurance Co. of Newark, New Jersey, 128 Fla. 549, 175 So. 224, 225, we stated the rule to be applied in testing the sufficiency of circumstantial evidence in civil cases, as follows:
>
> 'In civil cases the preponderance of evidence required, where circumstantial evidence is relied on as the method of proof, is a preponderance of all reasonable inferences that might be drawn from the circumstances in evidence to prove the principal fact sought to be establishes sufficient to outweigh all other contrary inferences. King v. Weis-Patterson Lumber Co., 124 Fla. 272, 168 So. 858.' (p. 863)

It will, therefore, appear that the Supreme Court of Florida has, since its decision in **Abraham v. Baldwin,** supra, decided in 1906, followed the general rule as applied to circumstantial evidence in civil cases, without interruption, except in the cases of **Florida East Coast Ry. Co. v. Atcheson,** supra, and **Foster v. Thornton,** supra.

Petitioner places strong reliance upon **Mutual Life Ins. Co. v. Zimmerman,** 75 F. (2d) 758, which was decided by the Circuit Court (5th) in 1935. But that case was not a disappearance case nor was it a suicide case and that Court so recognized by the following language (text (761):

> "The question here is whether Zimmerman was drowned on August 24, 1927, for there is nothing to show that he died by any other means or on any other date. The jury, though finding he was dead, declined to find that the death was accidental. The verdict seems to imply suicide; **but in our opinion the evidence does not show that he was dead at all at the expiration of the insurance.**" (Emphasis supplied)

It is, therefore, clear that the Circuit Court reversed the case on what it conceived to be the insufficiency of the evidence to show that Zimmerman was dead at all. The declaration in that case alleged that Zimmerman died on August 24, 1927. The plaintiff beneficiary brought suit on the policies in September, 1929. Therefore, the case was not concerned with the presumption of death from seven years absence nor was any such theory in any wise injected into the case. The Circuit Court further said in its opinion in the Zimmerman case (text 762):

> "There is a possibility that he is dead, but the circumstances are not such as to make that the only probable explanation of them. Circumstantial evidence, even in a civil case, must not only consist with the theory that authorizes recovery, but must fairly and reasonably exclude any other explanation of the facts. Unless it does this, the burden which rests upon the plaintiff to prove her case is not carried. Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct., 391, 77 L. Ed. 819; Florida East Coast R. Co. v. Acheson, 102 Fla. 15, 135 So. 551, 552, 137 So. 695, 140 So.

467; Foster v. Thornton, 113 Fla. 600, 152 So. 667."

It is clear from the foregoing language that the Circuit Court placed reliance upon the two decisions of the Florida Supreme Court in Florida East Coast R. Co. v. Atcheson and Foster v. Thornton, but overlooked the other decisions of the same Court hereinabove referred to, which laid down the rule as to circumstnatial evidence in civil cases. It will be particularly noted that the Court overlooked the decision in City of Pensacola v. Herron, supra, which was decided in November, 1933. It is still more important to note that the Circuit Court did not apply any law of Florida as to circumstantial evidence applicable in suicide cases, such as laid down in Sovereign Camp W. O. W. v. Hodges (petitioner's brief p. 10) or in **Blackwood v. Jones,** 149 So. 600, —— Fla. ——.

We respectfully suggest, therefore, that it does appear that the Supreme Court of Florida has modified the rule as to the sufficiency of circumstantial evidence in civil cases, as shown by the foregoing decisions, and that the Circuit Court was correct in so stating in the case at bar. The Circuit Court did not take the position that there was not an exception to this general rule as to certain issues in suicide cases. As to whether the Court should have applied the so-called "suicide rule" will be argued under the succeeding topic.

II.

CIRCUIT COURT APPLIED CORRECT LAW AS TO EVIDENCE SUFFICIENT TO FIX TIME OF DEATH WHERE AIDED BY PRESUMPTION OF DEATH AND FACT OF DEATH.

No decisions have been found in Florida touching the question of sufficiency of evidence to support the fixing of time of death in disappearance cases. The point is apparently not made by petitioner that the Circuit Court was in error in holding the evidence sufficient in determining death. Complaint is made only as to evidence fixing the time of death. The disappearance was at the end of December 1928. The policies remained in force and would not have expired until May 22, 1935 (R. 341-2). It was only necessary, therefore, that the fixing of the time of death was between the period from the 28th of December, 1928, the date of disappearance and the 22d of May, 1935. The policy was in effect, therefore, for a period of almost seven years. More than thirteen years had elapsed at the time of trial since the disappearance.

Davie v. Briggs, 97 U. S. 628, 97 Sup. Ct. 628, 24 L. Ed. 1086, held that in disappearance cases, there must be evidence of encountering some particular peril but this rule was departed from in **Fidelity Mutual Life Ins. Co. v. Mettler,** 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922, where it was held:

> "That the inference of death might arise from a disappearance inconsistent with the continuance of life even though exposure to particular peril is not shown."

The Fifth Circuit Court of Appeals recognized this distinction in the case of **United States v. Hayman,** 62 Fed. (2d) 118, and there accepted the rule as laid down in the case of **Tisdale v. Mutual Life Ins. Co.,** 26 Iowa, 170, 96 Am. Dec. 136, as follows:

> "The fact of the disappearance with no reason for it, the fact that though home-bound in his affections and habits, the absent one is never heard of again is itself without more, especially after seven years have passed, sufficient to support a verdict of death at the time of disappearance."

In the Hayman case the Court sustained findings based wholly upon circumstantial evidence and fixed the time of death as of the time of disappearance. There was no strong evidence as of suicide, or of desperate health or financial circumstances as in the case at bar. The Court approved the decision of the Supreme Court of Texas in **American Nat. Ins. Co. v. Hicks** (Tex. Com. App) 35 SW (2d) 128, 132, 75 A.L.R. 623, where it was said:

> "She was without the means of furnishing sufficient legal testimony to support it (her claim of death), until the fact had developed that Archie Hicks had absented himself for seven years successively. When this fact developed, the defendant, in error, for the first time, was in possession of sufficient legal evidence to support her cause of action. Aided by this potent fact, the other facts in the case became entitled to more weight * * * than they could possibly have been entitled to have been given, until the development

by time of the fact that Archie Hicks had absented himself for seven years."

The determination of death after the lapse of seven years would, as the Court held in the Hayman case, **becomes a potent fact and all other facts then become entitled to more weight.** It is respectfully submitted for that reason the strict rule, referred to in certain Florida decisions, where one has the burden of proving suicide, would not be applicable.

This point is well stated in 16 Amer. Juris. Section 35, page 29 as follows:

> "To raise a presumption of death at a particular time within seven years, special facts and circumstances should be shown, reasonably conducing to that end. The evidence need not be direct or positive; it may be indirect or inferential, but it must be of such a character as to make it more probable that he died at the particular time than that he survived. . . . **It has been declared, however, that the aid given by the presumption of the fact of death makes comparatively lighter the task of fixing the time of death."**
> (Emphasis supplied)

From the same text, Section 36, page 31, we again quote:

> "The death of an absent person before the expiration of seven years may be presumed or inferred from circumstances other than exposure to a

probably fatal danger, where such circumstances show an improbability of, or lack of motive for, a mere abandonment of his home. Such circumstances include the character, habits, conditions, affections, attachments, prosperity and objects in life of the absentee, which usually control the conduct of men, and in view of which no reasonable explanation can be given for his absence. Such an inference or presumption may also be warranted by the age, occupation, or prospective journey of a given individual or by circumstances indicating suicide."

The following leading cases have upheld the foregoing principles of law:

Travelers' Ins. Co. v. Bancroft, 65 F. (2d) 963 (C.C.A. 10th)

Northwestern Mutual Life Ins. Co. v. Stevens, 71 F. 258, text 261 (C.C.A. 8th)

Penn Mut. Life Ins. Co. v. Tilton, 84 F. (2d) 10 (C.C.A. 10th)

Equitable Life v. Sieg, 74 F. (2d) 606 (C.C.A. 6th)

In the case of **United States v. O'Brien,** 51 F. (2d) 37 (C.C.A. 4th) the Court held that the suicide note was sufficient to justify submitting the cause to the jury, coupled with the fact of the disappearance and absence, the Court holding that it was solely a jury question and that the inferences to be drawn must be drawn from questions of fact or mixed questions of fact and law, by

a jury, and that the drawing of such inference is peculiarly for the jury or trier of the facts.

The case of **Winter v. Supreme Lodge**, 101 Mo. App. 550, 73 SW 877, the Court recognized that when it comes to fixing the time of death only the following is required:

> "Plaintiff is not required to establish beyond a reasonable doubt the fact of death of the insured prior to the date of default, but merely to furnish proof which tends to show that the fact, or to make it appear to the jury more probable or credible than otherwise; that is to say, by the preponderance of the evidence."

The general rule is stated in Text 75 A. L. R. page 635:

> "If the evidence is disputed, or if, though not disputed, different relevant inferences may reasonably be drawn therefrom, the question of the fact of death of the insured, as well as the time of death, is one for the jury."

In the trial of the case at bar, the two issues were as to the **fact of death** and as to the **time of death, not as to the cause of death.** The strict rule contended for by petitioner with respect to circumstantial evidence in suicide cases may properly be applied where an affirmative defense of suicide is raised by insurer. There was no such issue in the case at bar. It was for the jury to say, taking into account, the facts and circumstances when the assured died. A case meeting widespread approval

on this point is **Mutual Life Ins. Co. v. Louisville Trust Co.**, 207 Ky. 654, 269 SW 1014, where it is said:

> "Under the facts proven, (the assured) was presumed to be dead. When he died was a fact to be found by the jury. His letters indicating his intention to commit suicide were themselves some evidence of that intention. He may truly have had no such intention; that was a question for the jury. . . . In the absence of anything to the contrary, the presumption is that these letters correctly stated his intention. Whether they did or not, and whether he committed suicide then or not, were questions for the jury. Although it is necessary that the beneficiary by distinct proof establish the time of the death of the assured, aided by the presumption of the fact of his death from absence, he is in a materially better position to effect a recovery than if unaided by such presumption."

There was abundant evidence in the case at bar sustaining suicide and, among other things, a letter written just ten days before the disappearance, where the insured was urging his bank to pay the premiums on his policy as follows: (Record 291-2)

> "I hope that for the protection of your Bank and my family, some arrangements may be made. I have been in bad health for quite a while and unable to work, but guess I will be alright or dead one by the time another premium comes due after this one."

This letter, coupled with great despondency of mind, desperate financial circumstances and indirect threats of suicide made to his daughter, and the extremely poor condition of the health, supports the finding of the jury, which has been approved by the Court.

But the case did not stand alone on the contention that there was suicide. This was only one phase of the evidence which indicated death within the period that the policy ran after disappearance. There was ample evidence to sustain the finding that death would have followed before the policies expired, due to the condition of health. The jury did not specify the cause of death but only the time of death.

> "Death may be presumed where, within the time, the absentee was known to be in a desperate state of health."
>
> **Jones on Evidence,** Civil cases, Volume 1, page 113.
>
> See also annotations:
>
> 34 A. L. R. 1389
> 61 A. L. R. 1327
> 75 A. L. R. 634.

CONCLUSION

We respectfully submit, therefore, that the Circuit Court was correct in refusing to apply, in the case at bar, the strict rule as to the sufficiency of circumstantial evidence in suicide cases. True it is that all evidence, both

as to the fact of death and as to the time of death is circumstantial; such is true in all disappearance cases; **but the fact of death as found by the jury and the presumption of death arising after the passage of seven years, with unexplained absence, furnishes strong support to any circumstantial evidence which is offered for consideration of the jury in fixing the time of death.** There is no strict issue as to any particular cause of death offered to the jury in the case at bar. Many facts and circumstances are offered for their consideration in fixing the time of death at some time within the period before the policy expired.

Counsel for petitioner has not cited any case in the nature of the one at bar where the strict suicide rule has been applied, either from the Supreme Court of Florida, or elsewhere. We suggest that there is a sound reason for not applying such strict rule in cases of this kind.

We respectfully submit, therefore, that there is no conflict between the decision of the Circuit Court of Appeals and the Florida decisions, and that the petition should be denied.

.....

.....

Attorneys for respondents
1117 Ingraham Building
Miami, Florida